LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U.S.
FILED
OCT 10 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 50

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

MANDELL & WRIGHT
707 South Coast Bldg.
Houston 2, Texas

Of Counsel:
HERMAN WRIGHT

TABLE OF CONTENTS

SUBJECT INDEX

	Page
Additional Statement of the Case	1
Argument	2-7
Conclusion	7

INDEX OF AUTHORITIES

New Amsterdam Casualty Company v. *Patton*, 22 S.W. 2d 540, 36 S.W. 2d 1000	6
25 Tex. Jur. 678, para. 250	2
25 Tex. Jur. 692, para. 254	2
Schutt v. *Commercial Travelers' Mutual Accident Association*, 229 F.2d 158, cert. den. 351 U.S. 940, 76 S.Ct. 836, 100 Law. Ed. 1466	4
Western Travelers Accident Association of California v. *Johnson*, 58 Pac. 2nd 206, 14 Cal. App. 2nd 306	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 50

LULU B. McGEE,

Petitioner,

vs.

INTERNATIONAL LIFE INSURANCE COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER

Additional Statement of the Case

Respondent's present gratuitous assertions as to its virtuousness come too late.

These assertions of alleged fact fall into three groups.

First, the Petitioner's suit in California was baseless and unwarranted (Respondent's brief, pp. 4, 11 and 12).

Second, that Respondent's transactions were isolated, and that its business was not of the mail-order variety (Respondent's brief, pp. 7, 8, 10, 11 and 12).

Third, that Respondent's transactions with deceased, resulting as they did from its reinsurance contract with the Empire Mutual Insurance Company of Arizona, were required and involuntary (Respondent's brief, p. 18).

ARGUMENT

A Judgment Valid on Its Face Is Not Subject to Collateral Attack

Whether Respondent could have established to the satisfaction of the trial court in California the unsworn, self-serving testimony it presents here no one now knows. Whether the trial court actually considered any or all of these alleged facts and found against Respondent is likewise not now known. In any event, the Respondent cannot reopen its case here, or in the Texas courts and present that testimony which it could and should have attempted to offer to the California court for consideration by the trier-of-the-facts.

There is no contention that this judgment of the California court is void on its face. 25 Tex. Jur. 692, para. 254. What Respondent seeks to do here is avoid, or evade, collaterally, the effect of the California judgment which is obviously valid on its face. 25 Tex. Jur. 678, para. 250.

> "A collateral attack on a judgment is an attempt to impeach a judgment by matters dehors the record in an action other than that in which it is rendered. It is an attempt to avoid the effect of a judgment or order perhaps made in some other proceeding." Clark v. DeSchamps, 109 Cal. App. 2nd 765, 769, 241 Pac. 2nd 681; Nielson v. Emerson, 119 Cal. App. 214, 6 Cal. App. 2nd 878, 137 Pac. 2nd 861.
>
> "A direct attack is one within the proceeding itself, taken within the time and according to the plan provided by law; for example, motions for new trial, appeal and motions to set aside the judgment in the manner provided by Code of Civil Procedure, Sec. 473." City of Los Angeles v. Glassell, 203 Cal. 44, 49,

262 Pac. 1084; McBeth v. McBeth, 219 Cal. 47, 25 Pac. 2nd 11.

"Insofar as judgments which do not show invalidity on their face are concerned, the main difference between the direct and collateral attack is that in the direct attack the true facts may be shown, while in the case of collateral attack we are confined to the inspection of the record conclusively presumed to be correct." City of Los Angeles v. Glassell, supra.

We think what has already been said is adequate answer to the first question presented in Respondent's brief (Respondent's brief, pp. 5-12). However, as to Respondent's arguments therein which we have grouped under Second and Third above, we would urge a further argument. For this argument, we assume that Respondent's policy with deceased was in truth and in fact its only policy issued to any citizen of California. We make the assumption without admitting the efficacy of the construction which Respondent puts upon the stipulation of fact entered into in the court below (Respondent's brief, p. 2). In truth, the construction now urged by Respondent was not urged by it until the case was in the Texas Court of Civil Appeals. Neither counsel for Respondent nor counsel for Petitioner knew the extent of the Respondent's business activity in California at the time the stipulation was entered into. The language of the stipulation referred to was intended to relate solely to the relationship between the two insurance companies on the one hand and the insured and his beneficiary on the other hand.

In any event, the facts are that in the fourteen months from October 1, 1949, the date the California Unauthorized Insurers' Process Act became effective (R. p. 55), and the date the claim herein arose, that is, the date of the insured's death (R. p. 17), there were approximately 4,666

separate invasions by Respondent into the State of California to do business with the deceased. Since premium payments could have been made by the month, the number of such invasions might well have been at least thirteen (R. pp. 21-36). And, had the deceased-insured lived longer, the number of such monthly or quarterly invasions of California by Respondent would have increased proportionately. It seems to us that the constitutionality of this statute ought not be made to depend upon the fortuitous longevity of the insured or the fortuitous selection of one premium payment plan over another by the insured. The record shows that premium notices were mailed quarterly by Respondent to the deceased-insured (R. pp. 21-36) and he, in turn, mailed Respondent the premium due (R. p. 17). The effect of Respondent's use of the United States mail was the same as if Respondent had sent its collector into California to notify the deceased-insured of the due date of the premium, and which collector then collected such premiums and delivered them to Respondent. *Schutt* v. *Commercial Travelers' Mutual Accident Association*, 229 F.2d 158, cert. den. 351 U.S. 940, 76 S.Ct. 836, 100 Law. Ed. 1466.

It appears that Respondent's business in California was not as isolated or minimal as Respondent would lead the court to believe, unless some importance is to be attached to the small premium involved. Again, we do not feel that the constitutionality of this statute should be made to depend upon the fortuitous financial circumstances of the insured. Should this statute be more objectionable on constitutional grounds if the premium paid is one dollar per month than if it is five hundred or five thousand dollars per month?

Certainly, there is nothing in the California Unauthorized Insurers' Process Act to indicate that the California

Legislature intended two such unpredictable elements to control the applicability of the statute to a given fact situation.

Section 1 of the California Act provides:

> "Section 1. The purpose of this act is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of the insured or beneficiaries under insurance contracts. The legislature declares that it is a subject of concern that nonadmitted insurers *have issued* policies of insurance to residents of this state * * *; that this state has an interest in providing to its residents a convenient forum for the purpose of asserting and enforcing legal rights under *such policies* * * * " (R. pp. 55, 56).

The foregoing provision expressed the concern of the legislature of California that nonadmitted insurers "*have issued*" policies to California residents, and that "*such policy*" holders were without a practical forum to enforce their rights under *such policies*. Thus, the legislature, so concerned, provided for a method of substituted service upon "*such insurers*," that is nonadmitted insurers who had, at the time of the legislative action, already issued policies to California residents, and that without regard to the size of the policy or the payment plan therefor.

Moreover, the criteria set by the legislature include criteria not related to the issuance of the policy, although that act constitutes one criterion. Thus, Section 1610 of the act provides that "*any*" of the "*acts*" described in Section 1611 shall constitute an appointment of the insurance commissioner as agent upon whom process can be served. Section 1611 includes, among others, the following acts, all of which occurred in this case after the effective date of the California Act:

"1611. The acts referred to in Section 1610 are:

'(3) The collection of premiums, * * * or other considerations for such contracts.

'(4) Any other transaction of business arising out of such contract' " (R. p. 57).

Nowhere does the legislature indicate that the circumstance of untimely death, or minimal premium shall relieve the nonadmitted insurer from the operation of the act.

We turn now to the Respondent's claim that its activities in California with the deceased-insured were involuntary in that such activities were no more than a discharge of its pre-existing obligations under its reinsurance contract with Empire Mutual Insurance Company of Arizona. At the outset, the language of the Texas court in *New Amsterdam Casualty Company* v. *Patton*, 22 S.W. 2d 540, 36 S.W. 2d 1000, quoted at page 16 of our brief would appear to be a ready and adequate answer to this plea. However, it should also be pointed out that the reinsuring of insurance risks by one company with another is an ordinary and customary business practice in the insurance industry. If, in truth and in fact, this policy was an isolated California situation for the Respondent, and was a risk it did not desire to carry after the effective date of the Unauthorized Insurers' Process Act, it could readily have divested itself of this business by reinsuring the risk with some other company which was either an admitted insurer in California, or was willing to assume the risk as a nonadmitted insurer. Respondent had fourteen months to thus divest itself of this risk. Having failed to do so, its conduct can hardly be characterized as involuntary.

In closing, something should be said about the California case of *Western Travelers Accident Association of California* v. *Johnson*, 58 Pac. 2nd 206, 14 Cal. App. 2nd 306,

cited by Respondent (Respondent's brief, p. 18). In our opinion, the case is not pertinent. It dealt with the power of California to tax gross premiums collected by a California insurance company in California. The particular policies had been originally issued by a Nebraska company. But the Nebraska company had completely withdrawn from California, and had turned over all its assets and liabilities (policies) to the California company which reissued the policies to the holders. The Court, assuming a hypothetical situation, said, in the language quoted by Respondent, that the continuance of the obligation of a policy issued in a particular state, with nothing more, would not constitute doing business therein for the purpose of exacting a tax. The language quoted by Respondent is obviously dictum; but nevertheless it has no pertinence to this case which involves the kind of contacts within a state necessary to establish the basis for jurisdiction through substituted service. Whether the concepts there expressed still have application for tax cases, we need not discuss here.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court reverse and remand this case with instructions to enter judgment for the Petitioner.

Respectfully submitted,

MANDELL & WRIGHT

By /s/ ARTHUR J. MANDELL
Attorneys for Petitioner
707 South Coast Building
Houston 2, Texas

Proof of Service

I, HERMAN WRIGHT, an attorney in the offices of Messrs. Mandell & Wright, attorneys of record for Lulu B. McGee, Petitioner herein, depose and say that on the 4th day of October, 1957, I served a copy of the foregoing Reply Brief for Petitioner on International Life Insurance Company, Respondent herein, by mailing a copy thereof in a duly addressed envelope with air mail postage prepaid to Messrs. Hornsby and Kirk, Respondent's counsel, at their address, P. O. Box 1058, Austin, Texas.

/s/ HERMAN WRIGHT

Herman Wright

SUBSCRIBED and SWORN TO BEFORE ME, the undersigned authority, on this 4th day of October, 1957.

/s/ BETTY DAVIS

Betty Davis

Notary Public in and for
Harris County, Texas

(Seal)